No. 87-476

Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

OCEAN CITY POLICE DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the 300-day charge-filing period, made applicable by Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), when the complainant "initially institute[s] proceedings" with a state or local agency, applies where the Equal Employment Opportunity Commission (EEOC) and the state or local agency have entered into a worksharing agreement determining that the EEOC rather than the state or local agency will initially process the complainant's charge.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App., *infra*, 1a-13a) is reported at 820 F.2d 1378. The panel opinion of the court of appeals (App., *infra*, 14a-19a) is reported at 787 F.2d 955. The district court's opinion (App., *infra*, 20a-39a) is reported at 617 F. Supp. 1133.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 41a) was entered on June 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice * * *.

29 C.F.R. 1601.13(a)(5)(ii)(A) (see 52 Fed. Reg. 10224 (1987)) provides:

> Where the document on its face constitutes a charge within a category of charges over which the [state or local fair employment practice] [a]gency has waived its rights to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

STATEMENT

This Title VII subpoena enforcement action presents the timeliness issue raised in *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), petition for cert. pending, No. 86-181. Specifically, it concerns the limitations periods for filing charges that are set forth in Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), and their relationship to the worksharing agreements entered into by the

EEOC, pursuant to Section 709(b), 42 U.S.C. 2000e-8(b), with state and local agencies that are administering their own employment discrimination laws. In this case, the Fourth Circuit, sitting en banc, reversed the district court's enforcement of an EEOC subpoena issued in connection with a charge of race discrimination. The court of appeals ruled that enforcement of the subpoena should have been denied because the charge in this case was untimely under *Dixon*.

1. On April 14, 1981, respondent Ocean City Police Department discharged the complainant from his employment as a police officer with the Department (App., *infra*, 2a). On November 19, 1981 (219 days later), the complainant visited the EEOC's Baltimore office and completed EEOC Form 283, entitled "Intake Questionnaire," in which he alleged that he had been harassed and terminated from employment on account of his race (App., *infra*, 21a; C.A. App. 9, 12). On December 16, 1981 (246 days after termination), the complainant executed a formal "Charge of Discrimination" and mailed it to the EEOC, which received it on December 21, 1981 (App., *infra*, 21a; C.A. App. 9, 13).

The EEOC is party to a worksharing agreement with the State of Maryland Commission on Human Rights (MCHR)[1] which contains, inter alia, a waiver by the MCHR of its right under Title VII (see 42 U.S.C.

[1] The EEOC has entered into worksharing agreements, pursuant to Section 709(b) of Title VII, 42 U.S.C. 2000e-8(b), with approximately 81 of the 109 state and local fair employment practice agencies that enforce state and local employment discrimination laws. Under these agreements, certain categories of discrimination charges are processed by state or local authorities; with respect to other categories, the state or local agency often waives its right under the statute to process the charge, and the EEOC processes the charge from the outset.

2000e-5(c)) to an initial period of exclusive processing of charges (C.A. App. 111-118). The waiver encompasses, with some exceptions, charges originally received by the EEOC (*id.* at 113-114).[2] Pursuant to the worksharing agreement, the EEOC transmitted a copy of the complainant's charge to the MCHR on December 22, 1981, along with EEOC Transmittal Form 212-A indicating that the EEOC would initially process the charge (*id.* at 148, 150). On January 19, 1982, the MCHR mailed Form 212-A back to the EEOC with an acknowledgment of receipt (*id.* at 151).[3]

The EEOC's District Office began to investigate the complainant's charge and issued a subpoena seeking documents from respondent relating to the allegations of employment discrimination (App., *infra*, 2a). Respondent opposed enforcement of the subpoena on the ground that the underlying charge was untimely (*ibid.*). The EEOC brought this enforcement action when respondent refused to comply with the subpoena, even after the Commission denied its administrative appeal (*ibid.*).

2. Following a non-evidentiary hearing, the district court granted the EEOC's application for enforcement

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[2] The waiver does not extend to charges originally received by the EEOC if (1) the charges are against certain respondents, as agreed to in writing by the EEOC and MCHR; (2) the charges allege at least one basis of discrimination which is outside the EEOC's jurisdiction; or (3) the charges are filed by the MCHR or one of its commissioners (C.A. App. 113). In addition, under the agreement the MCHR and the EEOC both retain the right to express an interest in pursuing any specific charge, even if primary responsibility for its processing is assigned by the agreement to the other agency, and the other agency will "wherever possible" defer to that request (*id.* at 115).

[3] While the bottom half of Form 212-A included boxes to be checked off indicating the MCHR's intentions regarding the processing of the Wright charge, the MCHR inadvertently did not complete these boxes (C.A. App. 151).

(App., *infra*, 40a). According to the district court (*id.* at 39a), the complainant's charge was timely because it had been received within 300 days of the alleged discriminatory act. The court rejected (*id.* at 37a-38a & n.5) respondent's argument that the extended 300-day limitations period did not apply because the waiver by the MCHR of its right to an exclusive charge processing period meant that proceedings were never "initially instituted" with the state agency as is necessary to trigger the longer limitations period under Section 706(e).

3. The court of appeals initially affirmed (App., *infra*, 14a-19a) without reaching the timeliness issue. The court held (*id.* at 17a-18a) that the subpoena was properly enforced because the timeliness issue was not properly before the court in a subpoena enforcement proceeding. The court noted (*id.* at 17a n.4), however, that it had that same day decided the timelinesss issue in another case, *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), petition for cert. pending, No. 86-181, in a manner favorable to respondent.[4] The court stated (App., *infra*, 17a n.4) that *Dixon* would "control" in this case "should [the complainant's] charge result in a Title VII suit."[5]

4. The court of appeals, sitting en banc, reversed (App., *infra*, 1a-13a). The court concluded (*id.* at 3a-10a) that the timeliness issue could be raised in a subpoena enforcement proceeding. The court declined (*id.* at 4a n.3)

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[4] In *Dixon*, the panel held that where the MCHR had, pursuant to a worksharing agreement, waived its right to an initial exclusive period for processing a charge, state proceedings were never "initially instituted," within the meaning of Section 706(e) of Title VII and, therefore, the extended 300-day charge-filing period available under that provision in that circumstance did not apply.

[5] Judge Widener, who wrote the *Dixon* decision, dissented on the ground that Title VII did not confer on the EEOC investigative authority over an untimely charge (App., *infra*, 19a).

the EEOC's invitation to reconsider the court's resolution of the timeliness issue in *Dixon* and held that the EEOC's subpoena was unenforceable because, relying on *Dixon*, the underlying charge was untimely.

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as that presented in *Dixon* v. *Westinghouse Electric Corp.*, petition for cert. pending, No. 86-181. In *Dixon*, the court of appeals held that the 300-day limitations period available under Section 706(c), 42 U.S.C. 2000e-5(c),when a charge is "initially instituted" with a state or local agency with jurisdiction concurrent to the EEOC, does not apply when a state agency has, pursuant to a worksharing agreement with the EEOC, waived its right to an initial exclusive period for processing a charge. The court of appeals' en banc decision in this case expressly relies on *Dixon* in ruling that the complainant's charge is untimely as a matter of law. The relevant facts of the two cases are nearly identical. In both cases, the charge was received by the EEOC in Maryland between 180 and 300 days after the alleged discriminatory act and was within a category of charges over which the MCHR had waived its initial exclusive processing rights. In both cases, the EEOC transmitted the charge and Form 212-A to the MCHR with a statement that, pursuant to the worksharing agreement, it intended to process the charge, and the MCHR returned the form to the EEOC with no indication that it wished to make an exception to the general provisions of the agreement and initially process the charge itself.[6]

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[6] In *Dixon*, the MCHR checked the box on the form indicating that it would not initially process the charge. In this case, the MCHR returned the form without (inadvertently) checking any box. For this reason, *Dixon* more neatly presents the timeliness issue.

On September 4, 1986, we filed a brief as amici curiae in support of the petition for a writ of certiorari in *Dixon*. In that submission, we contended that the decision of the court of appeals in *Dixon* is incorrect, is inconsistent with decisions of this Court and of other courts of appeals, and presents an important issue warranting this Court's review. Accordingly, we recommended that the Court grant review in *Dixon*. We did, however, also advise the Court that it might want to postpone disposition of the petition in *Dixon* because the Fourth Circuit had (then) recently granted rehearing en banc in this case, which offered an opportunity for the court to reconsider its *Dixon* ruling. Now that the court of appeals in this case has reaffirmed the vitality of *Dixon*, there is no reason to delay any further this Court's disposition of the petition in *Dixon*.[7]

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[7] We recently filed a motion to file a supplemental memorandum as amici curiae in *Dixon* along with a proposed supplemental memorandum. In that submission, we advised the Court of the court of appeals' decision in this case not to revisit its prior decision in *Dixon*. We also advised the Court of the possible relationship between the timeliness issue raised in both this case and in *Dixon* with the issue raised in *EEOC* v. *Commercial Office Products Co.*, cert. granted, No. 86-1696 (June 15, 1987). We recommended that the Court grant *Dixon* now and not postpone disposition of the petition pending its decision in *Commercial Office Products* because we perceived no fair possibility that the legally distinct *Dixon* issue would be addressed in the Court's opinion in *Commercial Office Products*. However, should the Court decide to postpone disposition of *Dixon* pending *Commercial Office Products*, the Court should similarly postpone disposition of the petition in this case. We have provided to respondent in this case copies of our brief and our motion to file a supplemental memorandum and proposed supplemental memorandum in *Dixon*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the certiorari petition or the decision in *Dixon* v. *Westinghouse Electric Corp.*, No. 86-181.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
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Equal Employment Opportunity Commission

SEPTEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1798

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

OCEAN CITY POLICE DEPARTMENT,
APPELLEE

On Appeal from the United States District Court
for the District of Maryland

Argued: October 7, 1986
Decided: June 24, 1987

Before: Winter, Chief Judge, Russell, Widener, Hall, Phillips, Sprouse, Ervin, Chapman, Wilkinson, Wilkins, Circuit Judges, and Haynsworth, Senior Circuit Judge.

WIDENER, Circuit Judge:

The Ocean City Police Department (the Department) appeals from the district court's order, see 617 F.Supp. 1133, enforcing a subpoena *duces tecum* to the Department pursuant to section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9. We deny enforcement of the subpoena.

The subpoena *duces tecum* was issued in connection with a charge of racial discrimination filed against the

Department by Keith L. Wright, a black male who was employed by the Department as a police officer from September 15, 1980 until his discharge on April 14, 1981. On December 21, 1981, 251 days after he was terminated, Wright filed a charge of discrimination with EEOC.

On December 6, 1983, EEOC issued a subpoena *duces tecum* to the Department requesting production of certain documents it alleged were necessary to its investigation of Wright's claim. The Department refused to turn over the documents and filed a petition to revoke or modify the subpoena, which was denied by EEOC. On March 19, 1984, the Department filed an administrative appeal, which also was denied. As a consequence of the Department's continued refusal to comply with the subpoena, EEOC initiated this subpoena enforcement proceeding in the United States District Court for the District of Maryland.

The Department opposed enforcement on the ground that Wright has failed to file a timely charge of discrimination, and that EEOC was therefore without authority to investigate the charge. Following a non-evidentiary hearing, the district court held that the charge had been timely filed and granted EEOC's application for enforcement of the subpoena. Subsequently, the district court granted the Department's motion to stay enforcement pending the outcome of this appeal.

On appeal, a panel of this court upheld the order, but for reasons different from those relied on by the district court. Although the panel noted that, under *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), the charge in question has not been timely filed,[1] it nevertheless held that the district court had properly en-

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[1] *EEOC v. Ocean City Police Department*, 787 F.2d 955, 957 n.4 (4th Cir. 1986).

forced the subpoena because "the timeliness of the charge was not properly before the lower court in this subpoena enforcement proceeding."[2] Subsequently we granted the Department's petition for rehearing en banc and, in disagreement with the panel, we reverse.

The general rule is that in a proceeding to enforce an administrative subpoena "the role of the district court. . . is sharply limited." *EEOC v. South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir. 1977). The justification for limiting the district court's role is one of efficiency. It would unnecessarily delay administration of statutes to conduct a trial within a trial at the discovery stage where the same issues may later be raised on the merits. Issues such as the scope of administrative regulations are for the enforcing agency to determine in the first instance, and a subpoena enforcement proceeding is not the proper place to challenge the agency's determination. See, *e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-09 (1943).

Nevertheless, the district court is not merely a rubber stamp in an enforcement proceeding, and this is true although enforcement is sought by EEOC. Congress intended to limited EEOC's investigative power to the access to information relevant to specific charges brought under Title VII. As the court noted in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1983), the "EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary power to demand to see records relevant to matters within their jurisdiction [*e.g.*, the Federal Trade Commission, the Court noted in a footnote], the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.' § 2000e-8(a)." 466 U.S. at 64.

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[2] 787 F.2d at 957.

The significance of the timeliness of the charge was not before the court in *Shell Oil.* In that case the employer defended enforcement of an EEOC subpoena on the ground that the charge did not contain information sufficient to satisfy § 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). Although the Court found that the requirements of § 706(b) had been met, it held that a charge meeting the requirements of § 706(b) was a "jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Id.* at 65. The same result had earlier been reached in this circuit, as the Court noted, in *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978).

In this case we are asked to order enforcement of an EEOC subpoena based on a charge which admittedly cannot be pursued for lack of timeliness.[3] This we decline to do. "In construing the EEOC's authority to request judicial enforcement of its subpoenas, we must strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination." *Shell Oil,* 466 U.S. at 65. The panel opinion recognized that *Shell Oil* established the rule that an EEOC subpoena may only be enforced if its underlying charge is valid.[4] However, the panel also apparently read *Shell Oil* as establishing that a charge need only meet the requirements of § 706(b) to be valid. We disagree. As noted above, the question of timeliness was not before the court in *Shell Oil*, and there is no language in the opinion to indicate that the requirements of a valid charge were to be limited to those contained in § 706(b). We think that requiring a subpoena to be based on a

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[3] EEOC also invites the en banc court to overule *Dixon v. Westinghouse Electric Corp.* We decline that invitation to reconsider *Dixon,* which we think was correctly decided.

[4] *EEOC v. Ocean City Police Department,* 787 F.2d at 957.

timely charge best gives effect to the Congressional policy of limiting EEOC's investigative powers by linking them to valid charges of discrimination. Therefore, we hold that a charge which shows on its face that it is untimely is also an invalid charge incapable of invoking EEOC's investigatory powers.

Ordinary logic indicates that it is beyond the authority of EEOC to investigate charges which cannot be pursued. EEOC is not empowered to conduct general fact-finding missions concerning the affairs of the nation's work force and employers. The only legitimate purpose for an EEOC investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the Commission finds the charge to be unfounded. But if no action can be taken on the charge, there is no justification for an investigation absorbing the resources of both the employer and the Commission. It would be anomalous to hold that a charge that was invalid to support an action was nevertheless valid to support investigation, the sole purpose of which is preparation for the action.[5]

This case should not be construed as affecting this court's decision in *EEOC v. South Carolina National Bank*, 562 F.2d 329 (4th Cir. 1977). In that case the court reversed a district judge's decision to deny enforcement of an EEOC subpoena on the ground that it was based on an untimely charge. The charge in *South Carolina National Bank* differed critically from the one in this case, however. In *South Carolina National Bank*, the charge alleged a continuing violation. This meant that the charge could not

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[5] We also note that it is already the law in this circuit that "(t)he effective filing of a timely charge with the EEOC is a prerequisite to the invocation of the administrative process within the EEOC." *Citicorp Person-to-Person Financial Corp. v. Brazell*, 658 F.2d 232, 234 (4th Cir. 1981). Although *Citicorp* was not an enforcement proceeding, certainly the issuance and enforcement of subpoenas constitute part of the "administrative process."

have been untimely on its face, since the most recent unlawful employment practice alleged would not be the one specified in the charge. The court cited with approval *Pacific Maritime Association v. Quinn,* 491 F.2d 1294 (9th Cir. 1974), which held that "it is not the function of the district court in an enforcement proceeding to determine the timeliness of a charge *that may appear to be of a continuing nature." South Carolina National Bank,* 562 F.2d at 332 (emphasis supplied). In the case at hand there is no allegation of a continuing violation, but rather an allegation of a single unlawful act on a specific date, or at the best for Wright of harassment ending on the same specific date. The difference is that here there are no facts in dispute relating to the timeliness of the charge, whereas in *South Carolina National Bank* the subpoena would have elicited information regarding the charge's timeliness. "The Commission wishes to subpoena material that will facilitate an informed judgment concerning the timeliness of this vague complaint, a judgment that is an essential part of its administrative task." 562 F.2d at 332. Obviously, as *South Carolina National Bank* holds, if the subpoena seeks information relating to the timeliness of the charge, the district court should not refuse enforcement on the ground of untimeliness. That is not the case here, however.

Nor do we think that *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943), requires a different result. In that case the Secretary of Labor sought a subpoena *duces tecum* pursuant to the Walsh-Healey Public Contracts Act. The Secretary was only empowered to investigate plants covered by the Act, and the contractor maintained that certain plants as to which records were sought did not fall within the Act's coverage. The Supreme Court enforced the subpoena, holding that the district court could not decide the question of coverage in that case. 317 U.S. at 509. However, the question of coverage there involved

the resolution of factual questions'[6] not merely the application of law to facts not in dispute, as is the case here. Among the factual issues as to which information was sought were amounts of payments to employees, which employees at which plants were covered, damages, and the date, if any, of the last employment of employees. 317 U.S. at 508.

The common thread running through the cases enforcing similar subpoenas has been a dispute over facts relevant to the agency's authority, facts which the subpoenas were often designed, at least in part, to illuminate. However, the Seventh Circuit has expressly held that a district court may resolve strictly legal issues in an enforcement proceeding. In *FTC v. Shaffner,* 626 F.2d 32 (7th Cir. 1980), FTC sought enforcement of a subpoena *duces tecum* to examine the records of an attorney thought to be engaged in illegal debt collection practices. The attorney defended enforcement on the ground that, *inter alia,* as an attorney the applicable statute exempted him from coverage. The Court of Appeals held that "a party can challenge the authority of an agency to issue a particular subpoena where. . . the issue involved is a strictly legal one not involving the agency's expertise or *any factual determinations.*" *Id.* at 36. (emphasis in original). The court denied relief on this ground, but only because "there may be issues of fact bearing on the legal question of whether appellee's activities fall within the statutory exclusion. The FTC's subpoena is properly designed to illuminate these questions." 626 F.2d at 36.[7]

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[6] See also *EEOC v. Roadway Express, Inc.*, 750 F.2d 40 (6th Cir. 1984) (subpoena enforcement proceeding improper place to resolve factual disputes over timeliness).

[7] The EEOC also cites *EEOC v. Tempel Steel Company,* No. 86-1679, ____ F.2d ____ (7th Cir. 1987), as authority for its position that a timeliness defense may never be raised in a subpoena enforcement proceeding. *Tempel* did state that the Seventh Circuit joined

Nothing is to be gained from enforcing the subpoena at issue here. None of the efficiency considerations favoring delayed review are applicable when the district court *facially* reviews an EEOC charge for timeliness. § 706(b)'s requirement that the charge include the dates of the alleged discriminatory practices makes this an easy chore. No discovery is necessary and the court does not have to construct a record. Furthermore, denial of enforcement in these situations gives effect to Congress' intent to limit the investigatory power to EEOC, relieves the employer of a completely unwarranted burden and frees the Commission to pursue timely charges. This point is illustrated by the case of *Federal Election Commission v. Florida for Kennedy Committee,* 681 F.2d 1281 (11th Cir. 1982). In that case, the opposition to the issuance of a subpoena issued by the Commission to the Kennedy Committee was that the disclosure requirements of the Federal Election Campaign Act of 1971 did not apply to the Kennedy Committee. 681 F.2d at 1286. The court took account of the general rule that the issuance of subpoenas by the agency is not subject to judicial review in the customary sense in order to contest the issuance of the subpoena but must await the outcome of the proceeding. Nevertheless, in that case, the court noted that "The FEC's authority to issue this subpoena can be determined without reference to any

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those courts that had determined that a timeliness defense may not be raised to block enforcement of an EEOC subpoena, but the court did not mention its own *Shaffner* case and also noted that an exception might exist where there was clearly no factual or legal support for the agency's preliminary determination to investigate, stating that *Tempel* was not such a case. Thus, we do not read *Tempel* as standing for the proposition that timeliness may never be a defense, and it probably should be construed as consistent with *Shaffner* in cases in which there is no factual or legal support for the agency's preliminary determination to investigate, as here.

further factual development." 681 F.2d at 1285. It further reasoned that resolution of the issue was "purely a legal question of statutory construction" and that resolution of the issue "neither requires the parties to engage in time consuming discovery nor requires the district court to construct a lengthy record." It concluded that none of the efficiency considerations favoring deferred customary judicial review were implicated when the legal issue was distilled, as there, and nothing would be gained by postponing judicial review of the issue. 681 F.2d at 1286. The court held that the district court erred in not inquiring into the FEC's specific statutory jurisdiction in the case.

The facts of the *Kennedy* case of any consequence are indistinguishable from those of the case at hand. Our case can be determined without reference to any further factual development. It presents a distilled and purely legal question of statutory construction: Does a charge which is admittedly untimely filed with the EEOC nevertheless give the EEOC the right to issue subpoenas to investigate the merits of the charge? Our case also does not require the parties to engage in time consuming discovery nor require the district court to construct a lengthy record. None of the administrative efficiency considerations favoring deferred review should apply here, and nothing will be gained by deferring judicial review of the issue.

In summary, we hold that, in a proceeding to enforce a subpoena issued by EEOC, the district court should review the underlying charge and deny enforcement if the charge shows on its face that it is untimely.[8] In situations where the Commission raises the possibility of waiver, estoppel,

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[8] In *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982), the court held that ". . . the adequacy of the date contained in the charge could and should have been determined from the face of the charge." 694 F.2d at 1065. See also *Roadway Express*, supra, 750 F.2d at 42, n. 1, and *EEOC v. K-Mart Corp.*, 796 F.2d 139, 146 (6th Cir. 1986).

or other circumstances indicating that the charge may be timely despite its facial invalidity, the district court should consider those claims. As to the type of showing the Commission must make in order to overcome the presumption of invalidity raised by a facially untimely charge, we have no occasion to consider that question which is better left for another day. In all events, no such suggestion has been made in this case.

The complaintant filed a charge with EEOC 251 days after his allegedly discriminatory discharge. He did not initially, or at any time, file a charge with the appropriate state agency for handling complaints of discrimination, in this case the Maryland Commission on Human Relations. Under our holding in *Dixon v. Westinghouse Electric Corp.*, a complainant must initially file a charge with the appropriate state agency in order to take advantage of § 706(e)'s 300 day filing period. Since Wright failed to file within the 180 day period, his charge is untimely as a matter of law, and the district court should have denied enforcement of the Commission's subpoena.

Accordingly, the judgment of the district court is REVERSED.[9]

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[9] The dissent sets up two straw men and then knocks them down instead of meeting the real issue in the case, that is, is enforcement required of a subpoena which is issued to investigate a charge which is unenforceable because admittedly untimely? Those straw men are that the majority holds that "timeliness is a jurisdictional prerequisite," p. 14, and that subpoenas should be enforced "only where there is concededly no timeliness problem," p. 15.

The second may be more quickly disposed of than the first, so we address it at the outset. The majority does not require that there be "concededly no timeliness problem." Indeed, the majority holding is that enforcement of a subpoena should be denied where the filing of the charge is concededly out of time or that such is otherwise apparent. The construction given to the majority opinion by the dissent is rejected.

Nothing in the majority opinion indicates that "timeliness is a

HALL, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that timeliness is a jurisdictional prerequisite to the enforcement of this subpoena. Key to the majority's decision is its unsupported belief that EEOC lacks authority to investigate claims which appear on their face to be filed untimely. *Shell Oil*, upon which the majority relies, provides no authority for this assertion. In *Shell Oil*, the Supreme Court held that EEOC may investigate only valid claims, but limited its definition of valid claims to those which meet the requirements of § 706(b). Significantly, § 706(b) does not mention timeliness.

The majority suggests that, ". . . there is no language in the (*Shell Oil*) opinion to indicate that the requirements of a valid charge were to be limited to those contained in § 706(b)." I disagree. In my view, *Shell Oil*'s definition of valid claims infers exclusivity, by stating that:

> [i]f the EEOC were able to insist that an employer obey a subpoena despite failure of the complainant to file a valid charge, Congress' desire to prevent the Commission from exercising unconstrained in-

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jurisdictional prerequisite," and this construction of the majority opinion is also unjustified and rejected. The fact that *Shell Oil* states that the existence of a charge which meets the requirements of § 2000e-5(b) is a jurisdictional prerequisite to judicial enforcement of a subpoena has nothing to do with the doctrine of delaying judicial review of the enforceability of subpoenas beyond the time when the agency has acted pursuant to the subpoena. As the *Kennedy* case sets out and discusses in some detail at 681 F.2d p. 1281-1284, the delayed scrutiny of such subpoenas is a judge-made and self-imposed limitation upon the degree to which federal courts will scrutinize agency requests for subpoena enforcement. Congress has granted jurisdiction to the federal courts under 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161(2) to enforce subpoenas. There is no doubt whatever that the federal courts have *jurisdiction* to enforce subpoenas in this case; whether or not they should do so is entirely another matter as the majority opinion sets out.

> vestigative authority would be thwarted. Accordingly, we hold that the existence of a charge that meets with the requirements set forth in § 706(b), 42 U.S.C. § 2000e-5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC. *Shell Oil,* 466 U.S. 54, 65 (1984).

I consider it speculative at best to assert that the Supreme Court intended to leave open the question of whether other claims are invalid, particularly in light of this plain language.

Moreover, I am unconvinced by the majority's assertion that "ordinary logic" indicates that it is beyond the authority of EEOC to investigate seemingly untimely claims. I agree with its assertion that "ordinary logic indicates that it is beyond the authority to investigate charges which cannot be pursued." However, in my view, it would be a rare case where timeliness could be conclusively determined prior to subpoena enforcement. The majority suggests that this determination is easily made by comparing the date of alleged discrimination to the filing date listed on the claim. However, it is unclear to me how a claimant can be certain when the last date of discrimination occurred without being afforded the discovery benefit of subpoena enforcement. The system proposed by the majority, (i.e., of enforcing subpoenas only where there is concededly no timeliness problem or where the claimant is already aware of an issue of fact which brings timeliness into issue) does not address this problem.

I see no support for the majority's conclusion that EEOC lacks investigative jurisdiction in this instance. I also believe that limiting such authority as suggested by the majority will prevent investigation of claims which would ultimately be determined timely given the benefits of subpoena enforcement. In my view, the majority has

prematurely addressed timeliness in finding the subpoena unenforceable. I would affirm the judgment below. Accordingly, I respectfully dissent.

I am authorized to state that Judge Winter, Judge Phillips, Judge Sprouse, and Judge Haynsworth join in this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1798

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

OCEAN CITY POLICE DEPARTMENT,
APPELLEE

On Appeal from the United States District Court
for the District of Maryland

Argued: February 4, 1986
Decided: April 10, 1986

Before: Widener and Hall, Circuit Judges, and Haynsworth, Senior Circuit Judge.

HALL, Circuit Judge:

The Ocean City Police Department (the Department) appeals from the district court's order enforcing a subpoena *duces tecum* issued by the Equal Employment Opportunity Commission ("EEOC") to the Department, pursuant to section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9. We affirm, but for reasons different from those expressed by the district court.

I

The subpoena *duces tecum* was issued in connection with a charge of racial discrimination filed against the Department by a former employee, Keith L. Wright. Wright, a black male, was employed by the Department as a police officer from September 15, 1980, until his termination on April 14, 1981. On December 21, 1981, 251 days after he was terminated, Wright filed a charge of discrimination with EEOC.

EEOC sent a copy of Wright's charge together with a Transmittal Form 212-A to the Maryland Commission on Human Relations ("MCHR"). The Transmittal Form indicated that, pursuant to the Worksharing Agreement[1] between EEOC and MCHR, EEOC would initially process Wright's charge. On January 19, 1982, MCHR sent the Form 212-A back to EEOC with an acknowledgement of receipt noted in the upper right hand corner. The charge was then investigated by EEOC in accordance with the provision of the Worksharing Agreement which provided the EEOC would be responsible for the processing of charges initially filed with it.

On December 6, 1983, EEOC issued a subpoena *duces tecum* to the Department, requesting the production of certain documents it alleged were necessary to its investi-

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[1] It is EEOC's practice to enter into "worksharing" agreements with state anti-discrimination agencies in order to eliminate duplication of effort. *See* 29 C.F.R. § 1601.13(c). These agreements assign each agency primary responsibility for investigating different categories of charges. Under the Worksharing Agreement between MCHR and EEOC, "[t]he EEOC will take primary responsibility for processing all charges originally received by EEOC." The Worksharing Agreement further provides that EEOC is to process all Title VII charges received by it "beyond six (6) months but before 300 days after the alleged violation." In addition, the Worksharing Agreement states that MCHR "waives its exclusive rights to specific periods of initial processing" granted to it by Title VII for those charges which the Worksharing Agreement assigns for initial processing to EEOC.

gation of Wright's claims. The Department declined to turn over the requested documents and filed a petition to revoke or modify the subpoena, which was denied by EEOC. In March, 1984, the Department filed an administrative appeal, which was also denied by EEOC.

Thereafter, the Department continued to refuse to comply with the subpoena, and EEOC initiated this subpoena enforcement action in federal district court. The Department opposed enforcement on the ground that Wright had failed to file a timely charge of discrimination within 180 days of the alleged unlawful act as required by section 706(e) of Title VII[2] and that, therefore, EEOC was precluded from investigating the charge. Following a non-evidentiary hearing, the district court held that the charge had been timely filed, and it granted EEOC's application for enforcement of the subpoena. Subsequently, the district court granted the Department's Fed. R. Civ. P. 62(c) motion and stayed its subpoena enforcement order pending the outcome of this appeal.

II.

On appeal, the Department contends that the district court erred in enforcing EEOC's subpoena *duces tecum*. Specifically, the Department argues that EEOC did not

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[2] Section 706(e) provides, in pertinent part, the following:

> *A charge* under this section *shall be filed within one hundred and eighty days* after the alleged unlawful employment practice occurred . . ., *except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency* with authority to grant or seek relief from such practice . . ., *such charge shall be filed* by or on behalf of the person aggrieved *within three hundred days* after the alleged unlawful employment practice occurred.

42 U.S.C. § 2000e-5(e) (emphasis added).

have authority to issue the subpoena and investigate Wright's charge because the charge was not timely filed. According to the Department, the charge was untimely because it was not filed within 180 days and it was not first deferred to MCHR as required by section 706(c).[3] We do not address appellant's contention, because we conclude that the issue of the timeliness of the charge was not properly before the lower court in this subpoena enforcement proceeding.[4]

Title VII confers upon EEOC the authority to investigate charges, to issue subpoenas, and to have subpoenas enforced. 42 U.S.C. §§ 2000e-5(b), 8(a), and 9. Courts are required to enforce administrative subpoenas if the investigation is within the authority of the agency, the demand is not too indefinite or burdensome, and the information sought is reasonably relevant. *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950); *EEOC v. South Carolina National Bank,* 562 F.2d 329, 332 (4th Cir. 1977). In this case, the Department does not contend that the subpoenaed information is irrelevant or the demand

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[3] Section 706(c) states that:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . *no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated.*

42 U.S.C. § 2000e-5(c) (emphasis added).

[4] We note that the untimeliness issue raised by the Department has today been decided by this Court in a manner favorable to the position advocated by appellant. *See* Dixon v. Westinghouse Electric Corp., ____ F.2d ____, No. 85-2033 (4th Cir. _____, 1986). We recognize that ultimately, should Wright's charge result in a Title VII action, our decision in *Dixon* will control. However, in the posture that this case has reached us, application of *Dixon* is now premature.

too indefinite or burdensome. Its sole argument is that EEOC lacks authority to investigate because the charge was not timely filed. We determine, however, that EEOC is not required to resolve whether a charge was timely filed as a prerequisite to its being able to conduct an investigation on that charge. Nor is the timely filing of a charge a matter to be considered by the district court in a subpoena enforcement proceeding.

In such a proceeding, the district court's role is "sharply limited." *South Carolina National Bank,* 562 F.2d at 332. "The administrative agency, not the court, is responsible for determining in the first instance through its preliminary investigations the coverage of the statutes the agency must administer." *Id.* (citations omitted). Questions of coverage or jurisdiction, such as whether the underlying charge is timely, are not for the court to decide in a subpoena enforcement proceeding. *See Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943).

The Supreme Court has held that an EEOC subpoena should be enforced so long as the underlying charge is valid. *EEOC v. Shell Oil Co.,* ____ U.S. ____, 104 S.Ct. 1621, 1629 (1984). To be valid, the charge need only meet the requirements of section 706(b). *Id.* Section 706(b) states, in relevant part, as follows:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

42 U.S.C. § 2000e-5(b). Section 706(b) establishes no limitations period whatsoever.

As we noted earlier, appellant does not contest the relevance or definiteness of the charge. Nor do we find that EEOC lacked authority to investigate the charge. Because section 706(b) sets forth no requirement that a charge must be timely filed, we conclude that the charge at issue here was facially valid. *See EEOC v. Roadway Express,* 750 F.2d 40, 42 n.1 (6th Cir. 1984). Thus, we hold that the district court did not err in enforcing the subpoena *duces tecum* issued by EEOC.

Accordingly, the district court's order is affirmed.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

We have only this day held in *Dixon v. Westinghouse Electric Corp.,* 85-2033, that the cause involved here may not be prosecuted on account of failure to file, as note 4, p. 5, in this opinion acknowledges.

I suggest that Title VII does not, over objection, intend to give investigatory subpoena authority to the EEOC for a charge which admittedly may not be prosecuted on account of the lapse of time. The holding of the majority leaves the way open for the EEOC to exercise its subpoena power to investigate any charge of a Title VII violation no matter how stale. More importantly, it leaves the district courts powerless to intervene. The fact that years may have passed without any recognition or notification of a claim makes no difference, for the mere fact that a claim is made under the majority holding is sufficient to require the enforcement of a subpoena. I do not believe the statute was intended to go so far.

I would reverse.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. K084-4448

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

OCEAN CITY POLICE DEPARTMENT

Filed: June 30, 1985

KAUFMAN, CHIEF JUDGE.

On December 6, 1983, the Equal Employment Opportunity Commission (EEOC) issued a subpoena *duces tecum* to the Ocean City Police Department (Respondent), requiring the production of certain data allegedly necessary to the investigation of a charge of discrimination filed against Respondent by Keith Wright. That subpoena was issued after Respondent had failed to respond fully to the EEOC's requests for data.

On December 16, 1983, Respondent filed a Petition to Revoke or Modify the Subpoena. On March 10, 1984, the EEOC issued its Determination on Respondent's petition, denying the request to revoke the subpoena in its entirety, and modifying the subpoena only as to the time limit for compliance. On August 3, 1984, the General Counsel for the EEOC affirmed the Determination issued by EEOC's Baltimore District office, and directed Respondent to provide the requested data by September 7, 1984. To date, Respondent has failed to comply with the subpoena. In that

context, the EEOC instituted this case in which it has filed an Application for Enforcement of Subpoena *Duces Tecum*.

On December 10, 1984, this Court ordered Respondent to appear on January 22, 1985, to show cause why this Court should not require Respondent to comply with the subpoena. Subsequently, on December 10, 1984, Respondent opposed in writing EEOC's subpoena enforcement action, the EEOC filed a written rebuttal, and a nonevidentiary hearing was held on the record on June 7, 1985. At the conclusion of that hearing, this Court informed counsel that it would enter an Order enforcing the subpoena as soon as it could prepare and file the within opinion and such Order.

I

Keith Wright alleges, *inter alia*, that he has been discharged by Respondent because of Wright's race, that only 9 of the 75 officers on the police force were black, and that while on the force, he was continuously harassed. Wright was discharged on April 14, 1981. On November 19, 1981, he completed an EEOC "Intake Questionnaire," and on December 16, 1981, he signed a formal "Charge of Discrimination." That formal charge was received by the EEOC on December 21, 1981, 251 days after April 14, 1981, the date of the discharge. At no time did Wright file any charge with the Maryland Commission on Human Rights (MCHR); nor did the EEOC ever refer this matter to the MCHR.

Section 706(b) of Title VII of the Civil Rights Act of 1964 authorizes the EEOC to conduct investigations of potential violations of the Act:

> Whenever a charge is filed by . . . a person claiming to be aggrieved . . . , alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on

> the employer . . . within ten days, and shall make an investigation thereof . . . [i]f the Commission determines after such investigation that there is not reasonable cause to believe the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . [i]f the Commission determines after such investigation that there is reasonable cause to believe that such charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion . . .

Section 709(a) of Title VII, as amended, 42 U.S.C. § 2000e-8(a), provides that the Commission may have "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." Section 710 of Title VII, 42 U.S.C. § 2000e-9, authorizes the Commission to obtain information relevant to discriminatory charges and to issue subpoenas requiring the testimony of witnesses and the production of evidence. Section 710 also confers upon any district court of the United States the jurisdiction to issue an order of compliance to any person refusing to obey a subpoena. *Id.*

The EEOC is entitled to access only to evidence "relevant to the charge under investigation," Section 2000e-8(a). The following legislative history reveals that that limitation upon the EEOC's authority is not, as Justice Marshall wrote in *EEOC v. Shell Oil Company*, ____ U.S. ____, 104 S. Ct. 1621, 1629 (1984), "accidental":

> "It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission's investigatory power is sig-

> nificantly narrower than that of the Federal Trade Commission or of the Wage and House Administrator, who are authorized to conduct investigations, inspect records, and issue subpenas [sic] whether or not there has been any complaint of wrongdoing." 110 Cong. Rec. 7214 (1964) (citations omitted).

In *Shell Oil*, after quoting that passage from the legislative history, Justice Marshall concluded that:

> we must strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination. If the EEOC were able to insist that an employer obey a subpoena despite the failure of the complainant to file a valid charge, Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted. Accordingly, we hold that the existence of a charge that meets the requirements set forth in § 706(b) . . . is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC.

Id. (footnote omitted). Accordingly, in order to establish entitlement to the grant of its written petition to enforce the subpoena in question, the EEOC must show that a valid charge was duly filed by Wright.

II

Section 2000e-5(c), 42 U.S.C. states in part:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . no charge may be filed under subsection (b)

> of this section by the person aggrieved *before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated* . . . (emphasis added).

Section 706(e) of Title VII, 42 U.S.C. Section 2000e-5(e) provides in part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed within three hundred days after the alleged unlawful employment practice occurred . . . .

The State of Maryland, through the MCHR, has established a state agency capable of affording relief from discrimination. Thus, Maryland is a Title VII "deferral" state in which the extended 300-day period for filing charges applies. *Soble v. University of Maryland*, 572 F. Supp. 1509, 1512 (D. Md. 1983), citing to *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 680 n.26 (D. Md. 1979).

In this case, Wright did not file a charge with the EEOC within the 180 day period or with the MCHR within the applicable state limitations period. Herein, the question arises as to whether, in order to invoke the extended 300-day federal filing period, a claimant must file a state charge within the *state* limitations period. The Maryland limitations period, pursuant to Article 49(b) of the Annotated Code of Maryland, Section 9(a), is 180 days.

In *Mohasco Corporation v. Silver*, 447 U.S. 807 (1980), Justice Stevens wrote in his majority opinion as follows (at 809-810):

> The question in this Title VII case is whether Congress intended the word "filed" to have the same meaning in subsections (c)[1] and (e)[2] of § 706 of the

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[1] "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority." 86 Stat 104.

[2] "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice

> Civil Rights Act of 1964, 78 Stat. 260, as amended in 1972, 86 Stat 104-105, 42 USC §§ 2000e-5(c) and (e) [42 USCS §§ 2000e-5(c) and (e)]. The former subsection prohibits the filing of an unfair employment practice charge with the federal Equal Employment Opportunity Commision (EEOC) until after a state fair employment practices agency has had an opportunity to consider it. The latter subsection requires that in all events the charge must be filed with the EEOC within 300 days of the occurrence. We hold that a literal reading of the two subsections gives full effect to the several policies reflected in the statute.

In *Mohasco*, the dissatisfied employee filed a letter complaint with the EEOC 291 days after his discharge. The matter was promptly referred by the EEOC to the New York State Division of Human Rights, *id.* at 810. That referral constituted a filing of the complaint by the EEOC on behalf of the complainant, *id.* at 816. The New York state agency completed its own proceedings 351 days after the date of discharge, *id.* at 812, 817. In that factual context, Justice Stevens, on behalf of a 6-3 majority, noted that "the question" was whether the receipt of the letter by the EEOC constituted a filing with the EEOC within the meaning of Section 706(e), and then wrote:

> The answer is supplied by subsection (c), which imposes a special requirement for cases arising in deferral States: "no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." Thus, in terms, the statute prohibited the EEOC from allowing the charge to be filed on the date the letter was received. Although, as the Court held in Love v.

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that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency." 86 Stat 105.

> Pullman Co., supra [404 U.S. 522, 525 (1972), it was proper for the EEOC to hold respondent's "complaint in 'suspended animation,' *automatically filing it upon termination of the State proceedings,*" 404 US at 526 (emphasis added), that means that the charge was filed on the 351st day, not the 291st. By that time, however, the 300-day period had run and the filing was therefore untimely.

Id. at 817 (footnote omitted).

Earlier in his opinion, (at 815-816) (footnote omitted), Justice Stevens concluded that Section 706(e)

> allows a filing with the EEOC after 180 days if "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. . . ."

Elaborating, Justice Stevens commented that

> a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period.

Id. at 814 n.16 (emphasis added). Further, *id.* at 816, n.19, Justice Stevens added that "Congress included no express requirement that state proceedings be initiated by any specific date" and that "we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' Love v. Pullman Co., 404 US 522, 527."

In *Hedman v. Coppin State College*, 35 F.E.P. Cases 7 (D. Md. 1982), the question arose as to whether certain claims of discriminatory employment practices were barred by limitations. In holding that they were so barred, Judge Ramsey wrote (at 11):

> If the charge must be filed with the state fair employment practices agency under 42 U.S.C. § 2000e-5(c), the time for filing an EEOC charge is extended to 300 days. Mohasco Corp. v. Silver, 447 U.S. 807, 810, 23 FEP Cases 1 (1980). The State of Maryland has established a deferral agency—the Maryland Commission on Human Relations (MCHR)—with authority to provide relief from unlawful employment practices. Article 49B, § 9(a) of the Annotated Code of Maryland provides that to be timely, a charge must be filed with the MCHR within six months of the alleged discriminatory conduct. Neither Hedman nor Grattan claim to have filed charges with the MCHR within six months of the alleged discriminatory conduct. Charges of discrimination, however, in both cases were filed with the EEOC within 180 days of their terminations.[2]
>
> In Mobley v. Acme Markets, Inc., supra, 473 F. Supp. at 857, the U.S. District Court for this District, relying on the Court of Appeals for the Fourth Circuit's decision in Doski v. M. Goldseker Co., 539 F.2d 1326, 12 FEP Cases 1751 (4th Cir. 1976), held that to trigger the longer, 300-day time limit for filing charges with the EEOC, state charges must be timely

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[2] Defendants do not contest the timeliness of Hedman's termination and equal pay claims and Grattan's termination claim, the principal claims made in these lawsuits. As counsel for plaintiffs noted at the hearing, it is not critical in these cases whether 180 days or 300 days is the appropriate limitations, since plaintiffs' claims, in large part, are either well within 180 days of their filings or well beyond 300 days of their filing with the EEOC.

filed under state law. Accord, Battle v. Clark Equipment, Brown Trailer Division, 524 F. Supp. 683, 686, 27 FEP Cases 830 (N.D. Ind. 1981) (and the numerous cases cited therein).[3] The Supreme Court's subsequent decision in Mohasco Corp. v. Silver, supra, does not require a different result. In Mohasco, the Supreme Court noted that a claimant in a deferral state was not required to file a charge of discrimination with the state's deferral agency within 180 days to benefit from the 300-day period for filing a charge with the EEOC. In that case, however, the plaintiff filed timely charges with the New York deferral agency under that state's one year limitations period. Thus, Mohasco did not disturb the principal first stated in this district in Mobley that plaintiffs who fail to file timely charges with deferral state agencies cannot take advantages of Section 706(e)'s 300-day limitation.

In *Soble v. University of Maryland*, 572 F. Supp. 1509, 1512-14, Judge Miller set forth the following analysis and conclusions:

> In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1976), the plaintiff failed to file her age discrimination charge with Iowa's State Civil Rights Commission within Iowa's 120 day age discrimination statute of limitations period. The Supreme Court concluded that Section 633(b) of the ADEA required grievants to resort to state administrative proceedings before bringing a suit in federal court. *Id.* at 754-58. Justice Brennan, writing for the majority, concluded that:
>
> > "exhaustion of state remedies under the ADEA could be met by an untimely filing of a charge

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[3] For an outline of the division on this issue which has existed among the lower federal courts, see Baruah v. Young, 536 F. Supp. 356, 361-62, 31 FEP Cases 1609 (D. Md. 1982).

> with the state agency, for the federal statute did not provide that the prerequisite state charge must be filed within the time limitation prescribed by state law. See 441 U.S. at 759."

By the language used in the majority opinion, it does not appear that the Supreme Court in *Oscar Mayer* confined its holding to state limitations of less than 180 days.[1]

This court, as well as several other courts, in interpreting language in the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 626(d) similar to the section of Title VII, 42 U.S.C. § 2000e-5(e) at issue here, has held that 300 days is to be allowed for filing an age discrimination claim in federal court in deferral states even if no charge of discrimination has been filed with the appropriate state agency within the limitations period established by the state of 180 days. (citations omitted).

In *Mohasco Corp. v. Silver*, 447 U.S. 807, the Supreme Court held that a plaintiff need not have filed a charge with the appropriate state agency within 180 days of his discharge in order to take advantage of the extended 300 day filing period available under Title VII. . . .

Although in *Mohasco* the state limitations period was greater than 180 days, the Supreme Court thereafter vacated and remanded for reconsideration in light of *Mohasco* two circuit court opinions which barred ADEA claims for failure to file with a state agency within the 180 day state limitation period. *Ciccone* [v. Textron, Inc.], 449 U.S. 914; Ewald [v. The Great Atlantic and Pacific Tea Co., Inc.], 449 U.S. 914. Citing these cases and also noting that the language and purpose of these sections of Title VII

and the ADEA are similar, see *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385; *Oscar Mayer*, 441 U.S. 750; *Citicorp Person-To-Person Fin. Corp. v. Brazell*, 658 F.2d 232 (4th Cir. 1981), subsequent cases have concluded that Title VII claims are not barred despite a grievant's failure to file a charge with the state agency within a state limitations period of 180 days. *See Jones v. Airco Carbide Chemical Co.*, 691 F.2d 1200 (6th Cir. 1982); *Hall v. Ledex, Inc.*, 669 F.2d 397 (6th Cir. 1982); *Owens v. Ramsey Corp.*, 656 F.2d 340 (8th Cir. 1981), *Wiltshire v. Standard Oil Co.*, 652 F.2d 837 (2d Cir. 1981), *cert. denied,* 455 U.S. 1034 (1982) [other citations omitted]. . . .

Because Title VII, unlike the ADEA which permits simultaneous filings with both the EEOC and the state agency, requires that the charge with the EEOC may not be instituted until 60 days after commencing the state charge, 42 U.S.C. § 2000e-5(c) [footnote 2 omitted], in *Mohasco*, the Supreme Court concluded that in deferral states a grievant who files her Title VII charge with the appropriate state agency within 240 days from the date of the alleged unlawful employment practices has timely filed her charge with the state agency so as to permit review by the EEOC if filed there within the 300 days deadline. . . .

This 240 day limitations period has not, however, been retroactively applied. *Wiltshire* [*v. Standard Oil Company of California*], 652 F.2d [837, 840-42 (9th Cir. 1981)]; *Hall* [*v. Ledex, Inc.*], 669 F.2d [397, 399 (6th Cir. 1982)]. Rather, courts have concluded, after reviewing the requirements for retroactive application of a decision in light of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *see also Stovell v. Denno*, 388 U.S. 293 (1967), that claimants filing a charge con-

taining Title VII claims with the EEOC before June 23, 1980 (the date of the *Mohasco* decision) are entitled to the 300 day rather than the 240 day extended period for the prerequisite filing with the state agency. *Wiltshire*, 652 F.2d at 842.

After reviewing the cases decided under the ADEA and Title VII, this court concludes that grievants in deferral states need not file a charge with a state agency within the state limitations period in order to obtain the benefit of the extended period of filing with the EEOC available in Title VII under 42 U.S.C. § 2000e-5(e). Prior to June 23, 1980, claimants are entitled to the 300 day rather than the 240 day, extended period for filing with the EEOC.

In *Haller v. Butler Shoe Corporation*, 595 F. Supp. 998, 999-910 (D. Md. 1984), Judge Northrop reviewed the issue and adopted Judge Miller's position, observing:

In *Soble v. University of Maryland*, 572 F. Supp. 1509 (D. Md. 1983), Judge Miller addressed and rejected the exact same argument raised by the defendant herein. In *Soble*, one of the issues was whether "plaintiff's failure to file a charge with Maryland's state agency within the 180-day state limitations period results in the plaintiff being denied the benefits of the extended federal filing period." *Id.* at 1512. After a thorough analysis of the applicable law, the Court held:

> [T]his court concludes that grievants in deferral states need not file a charge with a state agency within the state limitations period in order to obtain the benefit of the extended period of filing with the EEOC available in Title VII under 42 U.S.C. § 2000e-5(e).

Id., at 1514.

Defendant, aware that the *Soble* decision is directly contrary to its position, argues that *Soble* is incon-

sistent with other decisions of this District and that *Soble* was wrongly decided. The Court rejects these arguments. First, *Soble* was predicated on the decision rendered in *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980). The decisions reached by this District Court prior to that controlling Supreme Court decision are not persuasive on the issue raised herein. Thus *Soble* is more than just the most recent decision on this issue, it is the only decision that includes *Mohasco* in its analysis.

Second, the Court is not convinced that *Soble* was wrongly decided. . . . *Soble* provides a better reading of *Mohasco* and is more in line with other decisions that have addressed the issue and rejected the restrictive approach urged by the defendant. *See e.g., Smith v. Oral Roberts Evangelistic Ass'n Inc.,* 731 F.2d 684 (10th Cir. 1984) [other citations omitted]. Further support for the *Soble* decision can be found in the EEOC's Code of Federal Regulations as revised in 1981 to conform to the *Mohasco* decision. 29 C.F.R. § 1601.13(a)(3)(1981).[1]

Herein, this Court, fully persuaded by *Soble* and *Haller,* holds that Wright did not need to have filed his charge with MCHR within Maryland's 180-day limitations period in order to benefit from the extended 300-day federal filing period accorded to claimants in deferral states.

Respondent contends that, in any event, Wright's charge was untimely initiated with the EEOC for the additional reason that, since that charge was filed with the EEOC 251 days after the discriminatory act, if the EEOC had then referred it to the MCHR, the EEOC would still have had to wait 60 days to allow for state processing

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[1] *See also Equal Employment Opportunity Commission v. Pattin-Marion,* 588 F. Supp. 41 (S.D. Ill. 1984), citing, *inter alia* (at 44), to *Soble.*

before the EEOC could have considered the claim at the federal level. Thus, argues Respondent, Wright's charge cannot be deemed to have actually been filed with the EEOC prior to 300 days after the alleged discriminatory act. The answer to that position is that the EEOC and the MCHR are parties to a work sharing agreement. Pursuant to that agreement, the MCHR waived its right to "exclusive" processing of charges filed initially with the EEOC, and thereby relieved the EEOC of any need either to wait 60 days for state processing or to wait until state processing had terminated if Wright had, or the EEOC had, as neither in fact did, filed Wright's charge with the MCHR.

Paragraph 4c of the Worksharing Agreement between the EEOC and the MCHR[2] provides in part:

> The EEOC will take primary responsibility for processing all charges originally received by EEOC . . . . In addition, EEOC will process the following charges:
>
> * * *
>
> 6. All charges covered under Title VII which are received by EEOC beyond six (6) months but before 300 days after the alleged violation.

Paragraph 4d of that Agreement states:

> In order to facilitate early resolution of charges, the [MCHR] hereby waives its exclusive rights to specific periods of initial processing which have been granted to the [MCHR] by Title VII for those charges assigned by this Agreement to EEOC for initial processing.[3]

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[2] The effective date of that agreement is February 10, 1981. *See* Exhibit 2 to Reply Memorandum filed in this case on February 11, 1985, by the EEOC.

[3] Respondent takes the position that the Worksharing Agreement is null and void because it violates the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b), (c) and (d),

Section 1601.13(c), 29 C.F.R. of the EEOC's Procedural Rules and Regulations, provides:

> Pursuant to section 705(g)(1) and section 706(b) of Title VII, the Commission shall endeavor to enter into agreements with 706 Agencies and other fair employment practice agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the 706 Agency . . . .

Those same regulations also contain the following:

> A 706 Agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of Title VII with respect to any charge or category of charges. . . .
>
> * * *
>
> Where the document on its face constitutes a charge within a category of charges over which the 706 Agency has waived its rights to the period of exclusive processing . . . the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

"[T]he 'administrative interpretation of [Title VII] by the enforcing agency is entitled to great deference.'" *Griggs v. Duke Power Co.*, 401 U.S. 424, 434, (1971);

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which requires that administrative agencies submit proposed rules for publication in the Federal Register in order to give interested parties an opportunity to comment. Assuming *arguendo* only that the regulation calling for the worksharing agreements is of the type covered by the cited sections of the APA, the regulation was, in fact, published in the Federal Register. 30 F.R. 8407 (as amended 46 F.R. 43037). As to the worksharing agreement itself, there is no statutory or case authority suggesting the need for it to have been published in the Federal Register.

quoted in Doski v. Goldseker Co., 539 F.2d 1326, 1332 (4th Cir. 1976). In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64, n.4 (1980), Justice Blackmun, noting provisions of Title VII which "evidence the policy of promoting federal-state cooperation in enforcement," quoted specifically, *inter alia*, Title VII's authorization to the EEOC "to enter into worksharing agreements with those [State and local] agencies [charged with administering fair employment practice laws of the state] to facilitate the processing of complaints." In *Thompson v. International Association of Machinists and Aerospace Workers*, 580 F. Supp. 662, 665-6 (D.D.C. 1984). Judge Green wrote that:

> [I]n the District of Columbia the EEOC's deferral function is altered considerably by a worksharing agreement between the EEOC and OHR. The terms of that agreement provide that each agency will take primary responsibility for processing all charges of which it is the original recipient . . . and, "to facilitate the early resolution of charges," the OHR has "waived its exclusive rights to specific periods of initial processing" granted by Title VII for charges assigned by the agreement to EEOC for initial processing. . . .
>
> * * *
>
> In effect, by entering the worksharing agreement with EEOC, OHR [the Office of Human Rights of the District of Columbia] is deemed to have "terminated" its review function within the meaning of § 2000e-5(c).[4]

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[4] *See also Gunn v. Dow Chemical*, 552 F. Supp. 1172 (S.D. Ind. 1981) (state proceedings terminated where state agency waived its right to exclusive opportunity to resolve charge in worksharing agreement with EEOC); *Morgan v. Sharon Pennsylvania Board of Education*, 445 F. Supp. 142 (W.D. Pa. 1978); *Steissberger v. Rockwell International Corp.*, 29 F.E.P. Cases 1273 (E.D. Wash. 1982); *Yeung v. Lockheed Missiles & Space Co.*, 504 F. Supp. 422 (N.D. Cal. 1980) (all holding that state agencies' waivers in worksharing agreements with the EEOC are equivalent to termination of state proceedings.)

Finally, Respondent urges that if the worksharing agreement between the EEOC and the MCHR is valid, there is no need in this case, in which Wright filed only with the EEOC and not with the MCHR, to give effect to the 300-day period provided for in Section 706(e). Respondent contends that Maryland is not a deferral state with regard to such a charge since the EEOC did not need to wait for the MCHR to act. Defendant's said approach finds support in *Douglas v. Red Carpet Corporation of America,* 538 F. Supp. 1135-1138-39 (E.D. Pa. 1982) and *Klausner v. Southern Oil Company of New York, Inc.,* 533 F. Supp. 1335, 1338-1339 (N.D.N.Y. 1982) but is seemingly rejected in *Yeung v. Lockheed Missiles & Space Co.,* 24 F.E.P. Cases 1070 (N.D. Cal. 1980) and is not consistent with the result or the reasoning in *Soble.* Defendant's said approach also is in conflict with *Haller.* In the absence of any opinion of the Fourth Circuit indicating the views of that Court, this Court, finding *Soble* and *Haller* to be convincing, is not prepared to follow *Douglas* and *Klausner.* Rather, the view which this Court believes is correct is a simple one which laymen, unaided by attorneys, can rely upon in Title VII cases when instituting a case in federal court, i.e., that in a deferral state with a worksharing agreement of the type in existence between the EEOC and the MCHR, the complainant can timely file the federal court action if he does so within 300 days of the alleged discriminatory discharge.[5]

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[5] In *Lopez v. Sears, Roebuck and Company,* 493 F. Supp. 801 (D. Md. 1980), Judge Miller held that because of the Work Sharing Agreement then in effect between the EEOC and the MCHRC (706 Agency), the filing of the claimant's charge with the EEOC 212 days after the allegedly discriminatory discharge did not trigger the application of the extended 300-day filing period. In so holding, Judge Miller wrote:

> Under the terms of the Work Sharing Agreement, the MCHRC [Montgomery County Humans Relations Commission] would not act on the charge until the EEOC had 'resolved' the matter. In these circumstances, the plaintiff's charge was submitted to the MCHRC for informational purposes, with no contemplation on the part of the agencies that the MCHRC would process the plaintiff's case. Accordingly, the charges were never actually 'instituted'

> with the MCHRC, within the meaning of § 2000e-5(e), since there was no filing with an intent that the MCHRC would process the charge. Thus, the 180-day filing period is applicable in this case.

Id. at 805.

By way of contrast, in the within case, the Work Sharing Agreement between the MCHR and the EEOC during the time period relevant to this case by its own terms stated specifically that the EEOC would process "all charges covered under Title VII which are received by EEOC beyond six months but before 300 days after the alleged violation." *See supra* at 17-18. Thus, the agreement itself contemplates that *any* charge filed with the EEOC prior to 300 days is valid and timely. The Work Sharing Agreement in *Lopez*, on the other hand, made no reference to the 300-day time limitation; the only relevant passage of the agreement in *Lopez* (copy thereof has been placed in court file in this case) states simply that "[the state agency] hereby waives its exclusive right to process [the charges for which the EEOC would take primary responsibility] for 60 days, as provided in Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, so that [the] EEOC can take immediate action on such charges." The agreement does not suggest that any charge filed within 300 days is necessarily timely.

In addition, Section 1601.13, 29 C.F.R., cited *supra*, provides that when a state agency "has waived its rights to the period of exclusive processing . . . the charge is deemed to be . . . timely if the charge is received [by the EEOC] within 300 days from the date of the alleged violation." That regulation was not issued by the EEOC until October 1, 1981. The *Lopez* case was decided in May, 1980, when no such language was included in Section 1601.13 of the EEOC regulations then in effect. 29 C.F.R. 1601.13(d)(2)(iii) simply provided at that time that:

> Where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within 300 days and within the period of limitation of the appropriate 706 agency, the Commission shall process the document in accordance with paragraph (d)(1) of this section and shall assume jurisdiction 60 . . . days after the 706 agency proceedings have been commenced, except that where the Commission is earlier notified of the termination of the State proceedings, it shall immediately assume jurisdiction upon receipt of such notice.

By way of contrast with the situation in *Lopez*, the current EEOC regulations and the specific provisions of the Work Sharing Agreement in effect in the instant case indicate that the filing of Wright's charge with the EEOC 251 days after the allegedly discriminatory discharge triggers the application of the extended 300-day filing period, thus rendering Wright's charge valid and timely.

In sum, this Court holds that since Wright filed his complaint with the EEOC within 300 days after the alleged discriminatory conduct occurred, Wright's complaint was timely filed.[6]

/s/ FRANK A. KAUFMAN

Frank A. Kaufman
Chief United States District Judge

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[6] The EEOC contends that because Wright completed the EEOC's Section 706(e) "Intake Questionnaire" within 219 days of Wright's discharge, his charge was timely even if the EEOC had been compelled to wait out the 60-day referral period before deeming the charge "filed" under Section 706(e). That alternate contention need not be reached herein. However, it is noted that the EEOC did not, in fact, ever refer either Wright's formal charge or the Intake Questionnaire which Wright completed to the MCHR. Accordingly, the question arises as to whether, if the worksharing agreement does not waive deferral by the EEOC to await state processing, the formal charge or the Intake Questionnaire constitutes a valid charge. Because this Court holds herein that the waiver provided by the worksharing agreement eliminates the need for the EEOC to await the passage of 60 days, there is no need in this case to reach the EEOC's contention regarding the Intake Questionnaire.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. K-84-4448

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

OCEAN CITY POLICE DEPARTMENT,

ORDER

For the reasons set forth on the record during a hearing on June 7, 1985, and in an opinion filed even date herewith, the EEOC's Application for Enforcement of *Subpoena Duces Tecum* is hereby granted. Respondent shall comply with this Order by July 31, 1985.

It is so ORDERED, this 30th day of June, 1985.

/s/ FRANK A. KAUFMAN

Frank A. Kaufman
Chief United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1798

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE

vs.

OCEAN CITY POLICE DEPARTMENT, APPELLANT

Appeal from the United States District Court for the District of Maryland, at Baltimore

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[Filed June 24, 1987]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Maryland, at Baltimore, and was argued by counsel,

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, REVERSED.

/s/ JOHN M. GREACEN
John M. Greacen

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 181-483/60011

Supreme Court, U.S.
FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-476

In The
Supreme Court of the United States
October Term, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

OCEAN CITY POLICE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly declined to enforce a subpoena issued by the Equal Employment Opportunity Commission when the charge that allegedly formed the basis for the Commission's jurisdiction was filed 251 days after the alleged act of discrimination and the charge was never referred to a local antidiscrimination agency for processing, but, rather, had been sent by the Commission to such an agency merely for informational purposes.

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, Respondent states that the following parties appeared in the United States Court of Appeals for the Fourth Circuit:

Equal Employment Opportunity Commission: an agency of the United States Government with no corporate affiliates; and

Ocean City Police Department: an agency of the Town of Ocean City, Maryland, which has no corporate affiliates.

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STATUTES:

The Civil Rights Act of 1964, Title VII

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Art. 49B, Human Relations Commission, Section 9, MD. ANN. CODE (1986 Replacement Volume) 3

No. 87-476

In The
Supreme Court of the United States
October Term, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

OCEAN CITY POLICE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ocean City Police Department ("OCPD"), respectfully requests that this Court deny the Solicitor General's petition on behalf of the Equal Employment Opportunity Commisison ("EEOC"), seeking a writ of certiorari for review of the Fourth Circuit's decision in this case.[1]

[1] Those sections of the Solicitor General's petition citing the opinions below, the basis for this Court's jurisdiction, and the statutory and regulatory provisions involved are adopted by reference.

STATEMENT OF THE CASE

At issue in this case is whether EEOC's mailing of an employment discrimination charge to a state antidiscrimination agency that had previously waived the right to process it, extends the deadline for the filing of that charge with EEOC from 180 to 300 days. The United States Court of Appeals for the Fourth Circuit concluded that under Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), such a charge is subject to the shorter, 180-day deadline. Accordingly, it held the charge in this case to be untimely, and refused to enforce an EEOC subpoena based upon it.

The charge was filed by Keith Wright ("Wright"), a black former police officer with the Police Department of Ocean City, Maryland ("OCPD"). Wright claimed that OCPD discharged him because of his race on April 14, 1981. Wright filled out an EEOC charge form on December 16, 1981, which he filed by mail. It was received by the Commission's Baltimore District Office on December 21, 1981, two hundred fifty-one days after his termination.

Maryland has created a state antidiscrimination agency—the Maryland Commission on Human Relations ("MCHR")—which is empowered to remedy racially discriminatory dicharges from employment that occur in Maryland. MCHR is recognized by EEOC as a so-called "deferral" agency. Under Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c), charges alleging employment discrimination in Maryland must be filed with MCHR, and it must be given 60 days to resolve them, prior to the filing of any such charge with EEOC under Title VII.

On February 10, 1981, ten months prior to the filing of Wright's charge with EEOC, MCHR had entered into a so-called work-sharing agreement with EEOC. This agreement was intended to reduce duplication of effort by MCHR and EEOC with respect to charges cognizable by both agencies. The agreement provided that EEOC would take responsibility for all charges originally received by it. The agreement also provided that EEOC would take primary responsibility for processing of all charges covered under Title VII received by EEOC more than 180 days but less than 300 days after the alleged violations.[2] (C.A. App. at 111-118).

EEOC contends that pursuant to Title VII's "deferral" requirements in Section 706(c), it mailed a copy of Wright's Title VII charge to MCHR on December 22, 1981.[3] It further contends that it also mailed a Form 212-A with the charge. This form purportedly was executed by EEOC to indicate that under the work-sharing agreement with MCHR, EEOC would "initially process" the charge (App. at 2).

Form 212-A also contains check-off boxes, for use by the local agency to inform EEOC of its intentions. The local agency can either (1) simply acknowledge receipt of

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[2] Such charges, as was Wright's, are untimely under Maryland's employment discrimination law, which provides a six month limitation period. MD. CODE ANN., Art. 49B, Section 9 (1986 Repl. Vol.).

[3] EEOC made these contentions in a supplemental affidavit by the District Director of EEOC's Baltimore District Office. The affidavit is contained at C.A. App. 148 and reprinted in the appendix to this brief, which is cited as "App."

the charge, (2) state that it will process the charge and that EEOC should refrain from doing so, or (3) state that it will not process the charge. EEOC alleges that the Form 212-A sent with Wright's charge was mailed back to it by MCHR without any of these boxes being checked off. An affidavit filed by the Director of EEOC's Baltimore District Office states that EEOC regarded the lack of acknowledgement by MCHR as inadvertent and inconsequential (App. at 3). According to the District Director, the "Form 212 * * * is simply a 'record-keeping' form for use of the agencies." (*Id.*) In the Commission's view, execution of the form by the local agency "is not material to the processing of the charge" because the work-sharing agreement specifies already which agency is to process which charges. (*Id.*) Under that agreement the MCHR had agreed to take no action on Wright's charge because EEOC received it first, and because it was filed over 180 days after his discharge.

On December 6, 1983, nearly two years after EEOC received Wright's charge, the Commission issued a subpoena *duces tecum* to OCPD requesting the production of certain documents allegedly necessary to its investigation of Wright's claims. After unsuccessfully petitioning to revoke or modify the subpoena, OCPD continued to decline to comply. EEOC filed an application for enforcement with the United States District Court for the District of Maryland on December 7, 1984. On December 10, 1984, the district court ordered OCPD to show cause why it should not be required to comply with the subpoena. A non-evidentiary hearing was held on the record on June 7, 1985. (C.A. App. 119-20).

On June 30, 1985, the district court granted EEOC's application for enforcement of its subpoena. On July 8, OCPD appealed the district court's enforcement order, and on August 12, 1985, the district court stayed that order pending the outcome on appeal.

On April 10, 1986, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's enforcement order, holding that the timeliness of the charge was not an issue which properly could be considered by the district court in a subpoena enforcement proceeding. The panel majority, however, also determined that the charge was untimely under the court's reasoning in *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), *cert. pending* 55 U.S.L.W. 3115 (August 19, 1987). In *Dixon*, the court had concluded that when MCHR declines to process a charge pursuant to its work-sharing agreement with EEOC, no proceedings have been "initially instituted" with an "agency with authority to grant or seek relief from such practice." Under Section 706(e) of Title VII, 42 U.S.C. Section 2000e-5(e), the charging party in such a case therefore has only 180, rather than 300 days to file a Title VII charge based on the same alleged act of discrimination.

Circuit Judge Widener concurred with the panel majority's determination that Wright's charge was untimely, but dissented from the majority's decision to enforce the subpoena. He concluded that Title VII does not give EEOC investigatory authority over a charge which the entire panel agreed was untimely.

Following a rehearing on June 24, 1987, the court *en banc* reversed the panel, finding that the timeliness of an

underlying charge properly could be considered in a subpoena enforcement proceeding and that when the charge is untimely, the subpoena should not be enforced.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES UNIQUE CIRCUMSTANCES NOT PRESENT IN THE DIXON DECISION AND DOES NOT PRESENT A PRESSING ISSUE FOR REVIEW

The Solicitor General's petition characterizes this case as involving facts "nearly identical" to those in *Dixon v. Westinghouse*, 787 F.2d 943 (4th Cir. 1986) *cert. pending* 55 U.S.L.W. 3115 (August 19, 1987), and incorporates by reference his amicus brief in support of the certiorari petition in *Dixon*. Pet. at 6-7.[4] Assuming arguendo that this case were indistinguishable from *Dixon*, it would not be a proper case for review for the same reason that *Dixon* is not. The work-sharing agreement between EEOC and MCHR expressly provides that MCHR will not process charges such as that filed by Wright and Dixon but will defer to EEOC (C.A. App. 118). Accordingly, EEOC's mailing of such charges to MCHR does not constitute "initially institut[ing] proceedings with a state or local agency with authority to grant or seek relief from such practice," as required under Section 706(e) of Title VII:

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[4] The Solicitor General's petition for a writ of certiorari in this case is cited as "Pet.". His amicus brief in support of the petition for a writ of certiorari in *Dixon* is cited as "Am.Br."

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in the case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted* proceedings with a State or local agency *with authority to grant or seek relief from such practice* . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred***

(Emphasis added). Because the language of the statute is clear and unambiguous, there is no need for clarification of its requirements by this Court.[5]

Even more significant, however, is the fact that this case is not "nearly identical" to *Dixon*, contrary to the Solicitor General's representation. The Solicitor General concedes by footnote that "*Dixon* more neatly presents the timeliness issue" on which review is sought. Pet. at 6, n. 6. OCPD submits that it is precisely those facts which disrupt the "neat presentation" of the timeliness issue raised by the Solicitor General that warrant denial of his petition.

In *Dixon*, EEOC had mailed Dixon's Title VII charge, along with Form 212-A, to MCHR, just as it did with Wright's charge in this case. In *Dixon*, however, MCHR had checked off the box on the Form 212-A sent with

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[5] In the rehearing of this case *en banc*, EEOC tried to induce the Fourth Circuit to reconsider and reverse the panel decision in *Dixon*. In the court's decision after the *en banc* rehearing, *Dixon* was reaffirmed and none of the eleven judges who participated expressed any doubt about its accuracy. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 n.3 (4th Cir. 1987).

Dixon's charge, indicating that MCHR "will not process the charge." In contrast, MCHR did not check off any of the boxes on the Form 212-A that accompanied Wright's charge, but rather, returned it unexecuted. Subsequently, the District Director of EEOC's Baltimore office filed an affidavit in this case, characterizing the Form 212-A exchange as merely for "record-keeping." Her affidavit further represented that no response by the MCHR was necessary on the Form 212-A, because the election by MCHR of which charges to process already had been made by it in the work-sharing agreement:

> MCHR apparently through inadvertence and oversight, failed to place a checkmark on the appropriate line to indicate acknowledgment of the charge and the fact that the Commission would initially process it. However, such an oversight *is not material to the processing of the charge* as the work-sharing agreement between the agencies clearly controls which charges are to be initially processed by the Commission and which are not.

(App. at 3; emphasis added).

These concessions vitiate the Solicitor General's timeliness argument that he presses before this Court in *Dixon*, and by reference, in this case. The Solicitor General takes issue with the Fourth Circuit's determination that EEOC's mailing of the Title VII charges to MCHR did not constitute "initially institut[ing] proceedings" before a Section 706 deferral agency. Am. Br. at 9. The Solicitor General's argument in *Dixon* is that the exchange of Form 212 A between EEOC and MCHR did constitute an "institution of proceedings" sufficient to trigger the 300-day limitations period for filing Title VII charges:

> In this case, pursuant to the work-sharing agreement, the EEOC transmitted a copy of the charge to the MCHR, *which in turn formally notified both the EEOC and petitioner that it was terminating its proceedings and that the EEOC would handle the charge. Contrary to the court of appeals' characterization (Pet. App. 52), that exchange was not merely for "informational purposes."* Under the work-sharing agreement, the MCHR expressly reserved the right to assert an interest in processing a charge to which the agreement generally waived the MCHR's exclusive rights and generally assigned the EEOC primary responsibility (C.A. App. 84).
>
> * * *
>
> State agency proceedings have been "initially instituted," within the meaning of Section 706(e), even if immediately upon receipt of a copy of a charge from the EEOC, the state agency notifies the EEOC that it waives its right of exclusive processing and is terminating its proceeding.

Am. Br. at 9-10 (emphasis added).

Whatever dubious basis may be wrested from the *Dixon* record on which to characterize the exchange between EEOC and MCHR as "instituting proceedings", there is none whatever in this case. The affidavit of EEOC's Baltimore District Director constitutes a binding admission by EEOC that the Form 212-A sent with the Wright charge was purely for "record-keeping" and that MCHR's failure to execute it was irrelevant because the work-sharing agreement controlled. This concession, which is peculiar to this case, precludes any conceivable argument that proceedings of any sort were "initially instituted" before MCHR by EEOC's mailing Wright's charge to that agency. MCHR took no action at all with respect

to Wright's charge, including even acknowledging it, and EEOC admitted that no such action was expected or "material".

On this record, the inapplicability to Wright of the extended 300-day filing deadline is therefore beyond dispute. No arguable error in the result below has been demonstrated by the Solicitor General, which would justify review by this Court. In any event, the review of the court of appeals' holding would embroil this Court in considering the implications of Section 706(e) of Title VII on this unusual record with its unique admissions by EEOC. The involvement by this Court in such a fact-specific controversy would be wasteful of its limited certiorari jurisdiction.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

In his amicus brief in support of the petition in *Dixon*, the Solicitor General cites one principal decision that he contends is in conflict with *Dixon* and the decision below: *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985). *Isaac* addressed the issue of when proceedings "terminate" before a local agency for purposes of meeting the deferral requirements of Section 706(c). There was no question raised in *Isaac* concerning what constitutes the "initial instituting of proceedings" under Section 706(e) in these circumstances, nor had the local agency made any advance waiver under a work-sharing agreement of its right to process such a claim. Additionally, the First Circuit made no finding on the issue in this case by necessary implication.

III. REVIEW BY THIS COURT IS NEITHER APPROPRIATE OR NECESSARY

In his amicus brief in *Dixon,* as incorporated in his petition in this case, the Solicitor General concludes with *in terrorem* predictions of the consequences of bypassing review of the *Dixon* issue. He contends that EEOC may be required to revise its work-sharing agreements and related regulations and to implement a less efficient charge processing procedure. He also contends that the timeliness of thousands of charges filed with EEOC beyond the 180-day limitations period will be placed in doubt without clarification by this Court.

The dire consequences that EEOC predicts will result from denying review in either *Dixon* or this case are illusory. Any possible need to revise EEOC's work-sharing agreements and regulations would, at worst, necessitate reversion to those procedures utilized prior to 1981 to coordinate EEOC's operations with state and local deferral agencies. The resultant impact on equal employment opportunity administration reasonably could be expected to be minimal.

Alternatively, the alleged "doubt" that EEOC contends will be cast on pending EEOC charges filed after the 180-day limitations period is only significant to the extent that charging parties reasonably may have relied on the longer 300-day deadline. In *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), this Court succinctly rejected any such concern, noting that lay people were more likely to construe Title VII as generally providing a 180-day deadline:

> The unfairness argument is based on the assumption that a lay person reading the statute would assume

> that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person *would be more apt to regard the general obligation of filing within 180 days as the standard of diligence* he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

447 U.S. at 825 (emphasis added). An EEOC regulation adopting a contrary statutory interpretation was held to be inconsequential. *Id.*

The Solicitor General concludes his petition not with a request that certiorari be granted, but instead, by asking that this case be held in abeyance pending a decision in *Dixon*. His request is obviously not for certiorari in this case, but rather, for a limbo status. That request contradicts his assertion that this case raises important issues worthy of this Court's review. If, despite OCPD's arguments, this case is deemed to be appropriate for review, it should be consolidated with *Dixon* and reviewed as a companion case, so that the Court may consider the issues in light of the facts developed in this case. If, however, this case is not appropriate for review on its own unique facts, certiorari should be denied.

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CONCLUSION

For the foregoing reasons, the Solicitor General's petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1987

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant,	)	
v.	)	CIVIL ACTION NO.: K-84-4448
OCEAN CITY POLICE DEPARTMENT, Respondent.	)	

SUPPLEMENTAL AFFIDAVIT OF
DOROTHY E. MEAD

I, Dorothy E. Mead, being duly sworn, hereby depose and state as follows:

1. I am the Director of the Baltimore District Office of the Equal Employment Opportunity Commission ("Commission"), and, as such, I am the custodian of the Commission's investigative files in this office.

2. I make this supplemental affidavit on the basis of my own personal knowledge and my review of the Commission's investigative files entitled *Keith Wright v. Ocean City Police Department*, Charge No. 033-82-0502, and my experience with and knowledge of the Commission's rules, regulations, and practices.

3. On November 19, 1981, Keith Wright came to the Commission's Baltimore District office to file a charge under Title VII against the Ocean City Police Department

("Respondent"). On that date he completed EEOC Form 283 entitled Intake Questionnaire. As indicated in my initial affidavit in this matter dated December 3, 1984, the information provided by Mr. Wright in the Intake Questionnaire was sufficient to constitute a charge for timeliness purposes under section 1601.12(b) of the Commission's Rules and Regulations, 29 C.F.R. § 1601.12(b).

4. Mr. Wright's charge was "perfected" for service by placing the information provided by him on EEOC Form 5B and signed by Mr. Wright on December 16, 1981. Subsequently, on December 22, 1981, the perfected charge was mailed to the Maryland Commission on Human Relations ("MCHR"). Attached to the charge was EEOC Form 212-A ("Charge Transmittal") within which the Commission notified MCHR that pursuant to the worksharing agreement between the Commission and the MCHR, the Commission would initially process the *Wright* charge. Attached hereto as Mead Supplemental Exhibit "1" is the Form 212 referred to in this paragraph.

5. Under the record-keeping procedure adopted by this office and the MCHR with respect to charges of discrimination initially filed with the Commission, the MCHR, upon receipt of a Form 212, acknowledges receipt of the document by doing three things: First, it places a checkmark on the appropriate line in the bottom half of the form (under the words "To Whom It May Concern"). Second, it places the date and number which it assigns to the charge on the lower left-hand corner of the form; and third, it returns the completed form to the Commission.

6. Pursuant to the record-keeping procedures outlined in paragraph 5, the MCHR acknowledged receipt of the Form 212 and a copy of the *Wright* charge on January 19, 1982. A copy of the Form 212 received from the MCHR is attached as Mead Supplemental Exhibit "2". It is noted that the MCHR apparently through inadvertence and oversight, failed to place a check-mark on the apppropriate line to indicate acknowledgement of the charge and the fact that the Commission would initially process it. However, such an oversight is not *material* to the processing of the charge as the worksharing agreement between the agencies clearly controls which charges are to be initially processed by the Commission and which are not. The Form 212 on the other hand is simply a "record-keeping" form for the use of the agencies.

7. Further, affiant sayeth not.

/s/ DOROTHY E. MEAD
District Director
Baltimore District Office
Equal Employment Opportunity
Commission

Subscribed and sworn to before me this 23rd day of July, 1985.

/s/ Lawrence E. Carter
Notary Public

My Commission expires: July 1, 1986.